

Consumer Product Safety Commission

§ 1025.68

of the prohibition in § 1025.68 against certain *ex parte* communications.

(c) *Exclusions from the record.* The Presiding Officer or the Commission may disregard and order the exclusion from the record of any written or oral submissions or representations which are not made in good faith or which are unfair, incomplete, or inaccurate.

(d) *Appeal by excluded party.* An excluded party, participant, or representative may petition the Commission to entertain an interlocutory appeal in accordance with § 1025.24 of these rules. If, after such appeal, the representative of a party or participant is excluded, the hearing shall, at the request of the party or participant, be suspended for a reasonable time so that the party or participant may obtain another representative.

§ 1025.67 Restrictions as to former members and employees.

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employee restrictions applicable to former Commission members and employees, as set forth in the Commission's "Post Employment Restrictions Applicable to Former Commission Officers and Employees", 16 CFR part 1030, subpart L, shall govern the activities of former Commission members and employees in matters connected with their former duties and responsibilities.

(b) *Participation as witness.* A former member or employee of the Commission may testify in any proceeding subject to these Rules concerning his/her participation in any Commission activity. This section does not constitute a waiver by the Commission of any objection provided by law to testimony that would disclose privileged or confidential material. The provisions of 18 U.S.C. 1905 prohibiting the disclosure of trade secrets also applies to testimony by former members and employees.

(c) *Procedure for requesting authorization to appear.* In cases to which paragraph (a) of this section is applicable, a former member or employee of the Commission may request authorization to appear or participate in any proceedings or investigation by filing with the Secretary a written application disclosing the following information:

(1) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceedings or investigation during his/her service with the Commission;

(2) Whether the files of the proceedings or investigation came to his/her attention;

(3) Whether he/she was employed in the directorate, division, or other organizational unit within the Commission in which the proceedings or investigation is or has been pending;

(4) Whether he/she worked directly or in close association with Commission personnel assigned to the proceedings or investigation and, if so, with whom and in what capacity; and

(5) Whether during service with the Commission, he/she was engaged in any matter concerning the person involved in the proceedings or investigation.

(d) *Denial of request to appear.* The requested authorization shall not be given in any case:

(1) Where it appears that the former member or employee, during service with the Commission, participated personally and substantially in the proceedings or investigation; or

(2) Where the Commission is not satisfied that the appearance or participation will not involve any actual or apparent impropriety; or

(3) In any case which would result in a violation of title 18, United States Code, section 207.

§ 1025.68 Prohibited communications.

(a) *Applicability.* This section is applicable during the period commencing with the date of issuance of a complaint and ending upon final Commission action in the matter.

(b) *Definitions—*(1) *Decision-maker.* Those Commission personnel who render decisions in adjudicative proceedings under these rules, or who advise officials who render such decisions, including:

(i) The Commissioners and their staffs;

(ii) The Administrative Law Judges and their staffs;

(iii) The General Counsel and his/her staff, unless otherwise designated by the General Counsel.

(2) *Ex parte communication.* (i) Any written communication concerning a matter in adjudication which is made to a decision-maker by any person subject to these Rules, which is not served on all parties; or

(ii) Any oral communication concerning a matter in adjudication which is made to a decision-maker by any person subject to these Rules, without advance notice to all parties to the proceedings and opportunity for them to be present.

(c) *Prohibited ex parte communications.* Any oral or written *ex parte* communication relative to the merits of any proceedings under these Rules is a prohibited *ex parte* communication, except as otherwise provided in paragraph (d) of this section.

(d) *Permissible ex parte communications.* The following communications shall not be prohibited under this section.

(1) *Ex parte* communications authorized by statute or by these rules. (See, for example, §1025.38 which governs applications for the issuance of subpoenas.)

(2) Any staff communication concerning judicial review or judicial enforcement in any matter pending before or decided by the Commission.

(e) *Procedures for handling prohibited ex parte communication*—(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee shall be forwarded to the Secretary rather than to a decision-maker. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretary. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a decision-maker, he/she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion; and

(ii) In the event of a prohibited oral *ex parte* communication, the decision-

maker shall forward to the Secretary a signed and dated statement containing such of the following information as is known to him/her.

(A) The title and docket number of the proceedings;

(B) The name and address of the person making the communication and his/her relationship (if any) to the parties and/or participants to the proceedings;

(C) The date and time of the communication, its duration, and the circumstances (e.g., telephone call, personal interview, etc.) under which it was made;

(D) A brief statement of the substance of the matters discussed; and

(E) Whether the person making the communication persisted in doing so after being advised that the communication was prohibited.

(3) *Filing.* All communications and statements forwarded to the Secretary under this section shall be placed in a public file which shall be associated with, but not made a part of, the record of the proceedings to which the communication or statement pertains.

(4) *Service on parties.* The Secretary shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if other circumstances satisfy the Secretary that service of the communication or statement would be unduly burdensome, he/she, in lieu of service, may notify all parties in writing that the communication or statement has been made and filed and that it is available for inspection and copying.

(5) *Service on maker.* The Secretary shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A person subject to these Rules who make, a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject

to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

AUTHORITY: Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. 504 and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

SOURCE: 47 FR 25513, June 14, 1982, unless otherwise noted.

§ 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called “the EAJA” in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adjudicative proceedings before the Commission. An eligible party may receive an award when it prevails over Commission complaint counsel, unless complaint counsel’s position in the proceeding was substantially justified or special circumstances make an award unjust. This subpart describes the parties eligible for awards and the proceedings covered. The rules also explain how to apply for awards and the procedures and standards that the Commission will use to make them.

(b) *When the EAJA applies.* The EAJA applies to any adversary adjudicative proceeding pending before the Commission at any time between October 1, 1981 and September 30, 1984. This includes proceedings commenced before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

(c) *Proceedings covered.* (1) The EAJA and this rule apply to adversary adjudicative proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any component of the Commission is represented by an

attorney or other representative who enters an appearance and participates in the proceeding. The rules in this subpart govern adversary adjudicative proceedings relating to the provisions of sections 15 (c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064 (c) (d) and (f); 2066(b)), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), and section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern administrative adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)). See 16 CFR 1025.1.

(2) The Commission may designate a proceeding not listed in paragraph (c)(1) of this section as an adversary adjudicative proceeding for purposes of the EAJA by so stating in an order initiating the proceeding or designating the matter for hearing. The Commission’s failure to designate a proceeding as an adversary adjudicative proceeding shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA. Whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(3) If a proceeding includes both matters covered by the EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3) and 16 CFR 1025.3(f). The applicant must show that it meets all conditions of eligibility set out in this paragraph and in § 1025.71.

(2) The types of eligible applicants are:

(i) Individuals with a net worth of not more than \$1 million;

(ii) Sole owners of unincorporated businesses who have a net worth of not more than \$5 million including both personal and business interests, and not more than 500 employees;